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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 564

THE STATE OF WASHINGTON ON THE RELATION OF ARTHUR EBER SHERMAN, JR.,

Plaintiff.

vs.

THE BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION, A TRIAL COMMITTEE OR PANEL OF SAID BOARD AND E. FREDERICK VELIKANJE, HARVEY ERICKSON AND LEO DRISCOL, MEMBERS OF SAID PANEL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Arthur E. Sherman, Jr.
Werley Building,
South Bend, Washington.

James E. Duree
Nevitt Building,
Raymond, Washington.
PETITIONERS.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. ____

THE STATE OF WASHINGTON ON THE RELATION OF ARTHUR EBER SHERMAN, JR.,
Plaintiff.

vs.

THE BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of Certiorari issue to review the Order of the Supreme Court of the State of Washington, filed and entered in the above-entitled cause on July 3, 1962.

Arthur Eber Sherman, Jr.

Petitioners.

Opinions Below

No opinion was filed in support of the Order herein referred to entered July 3, 1962, App. Pg. 18 The opinions in the Matter of the Disciplinary Proceedings as to Arthur Eber Sherman, Jr., an Attorney at Law, are reported in 58 Wash. 2nd. 1, 354 P (2nd) 888.

Jurisdiction

The Supreme Court of the State of Washington denied, in part, petitioner's Affidavit for Writ of Prohibition and Motion to Strike and made certain directives, appointments and orders as provided in its Order dated and entered July 3, 1962, App. Pg. 18. On July 30, 1962, a Motion for Extension of Time in which to file Petition for Re-Hearing was filed and on that date denied upon the interpretation that re-hearing is not permitted on the record in this proceeding because of the wording of the State of Washington, Rules on Appeal, Rule 50, which reads in part:

> "Any party to an **appealed** case may, after an **opinion** has been filed, present to the Court, in the manner and time as hereinafter provided, a petition for rehearing." (Emphasis Added).

An Order Extending Time to File Petition for Writ of Certiorari, to, and including, October 31, 1962, dated October 1, 1962, and signed by the Honorable William O. Douglas was issued out of this Court.

Jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1257 (3).

Questions Presented

1. Whether the Supreme Court of the State of Washington has power to appoint counsel and to compel said counsel to serve without violating the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the Supreme Court of the State of Washington can compel said counsel to serve without compensation without violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the chairman of a panel hearing a disciplinary proceeding, who has indicated that he has reason to believe said attorney to be of unsound mind, and has called a hearing for the determination of that issue, can refuse to appoint counsel for said attorney under Rule VII K-2, App. Pg. 20, Rules for Discipline of Attorneys, State of Washington and Rule 24, App. Pg. 21, Rules for Discipline of Attorneys without violating the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether proceedings for discipline of an attorney can be prosecuted under the Rules for Discipline of Attorneys, State of Washington, without said attorney being represented by counsel, without violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

5. Whether, in a proceeding for discipline of an attorney, under Rules for Discipline of Attorneys, State of Washington, a hearing panel chairman can alone, contrary to Rule 7 K-2, Rules for Discipline of Attorneys, State of Washington, which requires a determination by the full panel, determine that defendant attorney is "of sound and sufficient mind that he could defend himself," without violating the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

6. Whether, in a proceeding for Discipline of an Attorney a Hearing Panel chairman can, without any evidence on the issue having been adduced at said hearing, and with all the material evidence in the record being in conflict with his determination, determine that defendant attorney is "of sound and sufficient mind that he could defend himself," without violating

the Due Process Clause of the Fourteenth Amendment to the constitution of the United States.

7. Whether the Supreme Court of the State of Washington can fail and refuse to rule on issues presented by an application for a Writ of Prohibition without violating the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

8. Whether the Supreme Court of the State of Washington can order that the "New" Rules for Discipline of Attorneys, State of Washington, shall apply to a proceeding pending at the effective date of said new rules without violating the Ex-Post Facto Clause of Art. I, Sec. 10 of the Constitution of the United States.

Constitutional Provisions, statutes, Rules and Regulations Involved

The Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States; Rule 7 K-2, Rules for Discipline of Attorneys, 57 Wash. 2nd., lix (App. Pg. 20, Rule 11-J, Rules for Discipline of Attorneys, 57 Wash. (2nd)., lxvii (App. Pg. 21), Rule 7-D, Rules for Discipline of Attorneys, 57 Wash. (2nd) lvi (App. Pg. 20), and Rule 24, Rules for Discipline of Attorneys, 34-A, Wash. (2nd, 190 (App. Pg. 21).

Statement

By a formal complaint verified November 20, 1958, Disciplinary Proceedings were instituted before the Board of Governors of the Washington State Bar Association against Arthur Eber Sherman, Jr.

On August 11, 1960, under Docket No. CD-4687 of

the Supreme Court of the State of Washington, said disciplinary proceedings came before that Court. At that time the Court expressed concern as to the mental condition, both past and present, of the Petitioner herein, 58 Wash. (2nd) 1, App. Pg. 21.

On July 6, 1961, under the same docket number, the disciplinary proceedings came before the Court on re-hearing. The Court remanded the matter to the Board of Governors of the Washington State Bar Association. The Court recognized that the mental competency of the Petitioner, Arthur Eber Sherman, Jr., herein, is both relevant and material. The procedure to be followed in determination of said competence was established by the Court as follows:

> "We approve of, and adopt, the recommendation of amici curiae: that a determination be made in accordance with Rule for Discipline of Attorneys 7 K-2. (effective January 2, 1961) as to whether Mr. Sherman is mentally capable of conducting a proper defense at this time." 58 Wash. 2nd. 1 (Page 9).

After remand the Chairman of a Trial Panel of said Disciplinary Proceeding, fixed a time and place for a hearing before said Trial Panel to determine whether at the time of hearing the plaintiff herein is of unsound mind to the extend that he is capable of conducting a proper defense. Ex. A, Affidavit for Writ of Prohibition.

Thereupon, on January 23, 1962, a hearing was convened before said Trial Panel. Before any proceedings were had, the plaintiff herein filed a written Motion for Appointment of Attorney. (Pages 1 and 2, Ex. B, Affidavit for Writ of Prohibition. Ex. C, Response to Order to Show Cause). Thereafter the petitioner herein continually orally objected to any further proceedings until counsel be appointed by said

chairman to act for, and on behalf, of said Petitioner in accordance with Rule 7 K-2, Rules for Discipline of Attorneys. No testimony or evidence was adduced at said hearing. Thereupon, the chairman, based on his own experience and personal observations, and disregarding the only medical evidence in the record. (Ex. B, Brief of Plaintiff) determined that the plaintiff herein was of sound and sufficient mind, that he could defend himself if he so desire. Page 4, Ex. B, Aff. for Writ of Prohibition; App. Pg. 21.

The Board of Governors of the Washington State Bar Association directed that the only basis on which the Board could appoint counsel would be if the plaintiff herein were found to be of unsound mind (Ex. C, Aff. for Writ of Prohibition).

No determination was ever made by the full panel of the issue of mental capacity of the plaintiff herein to defend the formal complaint against him, as required by law, but the determination was made solely by the panel chairman, "based upon his past experience, personal observations and that, to the best of his knowledge, the attorney is, and has been, practicing law." (Page 4, Ex. B, Aff. for Writ of Prohibition; App. Pg. 22).

Petitioner, Arthur E. Sherman, Jr., after continued objection to the proceedings set out herein in Exhibit B, Affidavit for Writ of Prohibition, grounded his objections on constitutional violations. (Ex. B, Aff. for Writ of Prohibition, Page 10 App. Pg. 22 Thereafter said Petitioner, at each and every stage of these proceedings, grounded his assertions of constitutional violations on the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. App. Pg. 22.

In addition to those constitutional violations

which came before the Court, there are others in the record on which petitioners rely, which could not have been anticipated and could not previously have been raised.

The Affidavit for Writ of Prohibition herein was filed in the Supreme Court of the State of Washington, on or about, May 14, 1962, and after an en banc hearing thereon on June 14, 1962, an Order (App. Pg. 18) dated and filed July 3, 1962, was entered by said Court denying said Affidavit for Writ of Prohibition.

On July 30, 1962, Petitioner Arthur Eber Sherman, Jr., filed with the Supreme Court of the State of Washington a Motion for Extension of Time in which to file Petition for Re-Hearing to which was attached an Affidavit which set out as follows:

> "That inasmuch as no provision is made in said Order or otherwise for compensation for his services as such, James E. Duree, a member of the Bar of the State, declines to serve as attorney for, and to represent the plaintiff herein, in this cause, or in the matter of the Disciplinary Proceedings against Arthur Eber Sherman, Jr., an Attorney at Law, until said compensation has been provided for."

A letter dated August 1, 1962, from the Supreme Court of the State of Washington was sent to James E. Duree, Attorney at Law, to inform him that the Court assumed that he was complying with the Order of the Court Appointing him to represent Petitioner, Arthur Eber Sherman, Jr., in the Disciplinary Proceedings and that the Court is aware that the Order does not provide for compensation. App. Pg. 24.

Reasons For Granting Writ

History has recorded that the concentration of

autocratic power in the hands of a few, however worthy the goal they profess, will, where the rights, and immunities of the governed are inadequately preserved, ultimately deteriorate into injustice. Such has been the history of the erosion of the rights of attorneys, or aspiring attorneys, in very recent times. Such will continue to be the administration of the bar unless this Court endeavors to create order and ajudicate justice in a field unique in its character and, by most Courts, held to be unamenable to any established doctrine of the law.

While this Court in the case of Cohen vs. Hurley 366 U. S. 117 (129) also Schware vs. Board of Examiners 353 U. S. 232 (238) determined that attorneys are entitled to the same process of law due others, it also raised a question, largely unanswered or in hopeless confusion in most jurisdictions as to what constitutes due process in cases of admission or discipline. The chaos which exists in the answer to that question is brought vividly to focus in the State of Washington by the case In Re Little, 40 Wash. (2) 421, 244 P. 2nd. 255, where a disciplinary proceeding is denominated civil in its nature and the case of In Re Sherman, 58 Wash. (2nd) 1, where it is assigned to the category of "a special proceeding, neither civil nor criminal." In cases such as the present, where questions of substance and national significance have been decided by the highest court of a state, it appears manifest that there are special and important reasons that this court should grant Certiorari in order to answer the question of what constitutes due process for the attorneys of this nation, who have hitherto been

subjected to a poorly defined procedure, the nature of which even the state courts are unable to define.

—I—

Question I

In assuming the power to appoint counsel herein, (App. Pg. 18), the Supreme Court of the State of Washington has violated the Fourteenth Amendment to the Constitution of the United States. Having been originally admitted by the courts, and retaining their right to practice only under supervision of these courts, attorneys are uniquely exposed to abuse by the courts of the power to impose duties. When such a duty is imposed by a court, assuming powers which it does not possess, an attorney, like any other citizen, should be protected against such abuse by review in this court. There is no authority in the law, statutes or court rules of the State of Washington for appointment, by the Supreme Court, of an attorney for respondent in a disciplinary proceeding. It is generally held to be true that "the inherent powers of courts are derived from the laws to which the courts owe their existence and do not exist without express or implied grant" 21 CJS Courts, Sec. 31, and that, for due process to have been accorded, "the jurisdiction of a court must be exercised in the mode prescribed by the "'law of the land'" 21 CJS Courts, Sec. 89. It is apparent, therefore, that the court has assumed powers which it does not possess in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, thereby making it necessary that this court establish by review a rule on this question of substance and national significance.

—II—

Question 2

In determining that an attorney so appointed shall receive no compensation, App. Pg. 18, the Supreme Court of the State of Washington has in this case decided another question of substance, not heretofore determined by this Court, and has clearly decided it in violation of the United States Constitution. While it is generally held that in criminal cases, which character this case does not have, an attorney assigned to defend an indigent accused must serve without compensation, 7 CJS, Attorney and Client, Sec. 172, (a) (1). The better logic is found in the opinions of courts following the minority rule, where it is reasoned that the idea of one calling being governed by special privileges or obligations and, therefore, being more honorable, is in fundamental conflict with the ideals of this democracy and belongs to a status of society hostile to liberty and equal rights. Knox County Counsel vs. State, 29 NE, Second 405, (408), 217 Indiana 493, 130 ALR 1427. The court reasons that if the state has not made provisions for the defense of poor prisioners, it has thereby placed a discriminating and unconstitutional burden upon the legal profession. Since the Supreme Court of the State of Washington has, in assuming powers that it does not possess, thus clearly acted in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States, and since, there is thus raised a question of substance and national significance of first impression in this court it is necessary that this court establish a uniform rule for the protection of the legal profession by granting a Writ of Certiorari herein.

—III—

Question 3

This court has on numerous occasions declared that the state cannot exclude a person from the practice of law, or from other occupations, in a manner, or for reasons, that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Schware vs. Board of Bar Examiners 353 U. S. 232 (238), Dent vs. West Virginia, 129 U. S. 114, (121) Cohen vs. Hurley, 366 U. S. 117 (129). That any procedure, to satisfy the requirements of Due Process, must accord with "the law of the land" has long been established. Dartmouth College vs. Woodward 4 Wheat. 518 (580-581). As to exclusion from the practice of law, this has been referred to in this court in the dissenting opinion in Konigsberg vs. State Bar of California 366 U. S. 36 (58) and Cohen vs. Hurley 366 U. S. 117 (141). Rule 7 K-2 "New" Washington Rules for Discipline of Attorneys establishes a procedure, which by careful examination can be made clear, whereby counsel must be appointed by the chairman prior to the determination of an attorney's mental capacity to defend in a disciplinary proceeding. App. Pg. 20 Rule 11-J specifically refers to Rule VII K-2 and provides for compensation App. Pg. 21. In the light of these two Rules the procedure adopted here is manifestly illegal. Inasmuch as it clearly appears that, as set out in the facts herein stated, Ex. B, Aff. for Writ of Prohibition, the panel chairman in no respect adhered to the Washington Rules for Discipline of Attorneys, App. Pg. 20, requiring him to appoint an attorney for a person possibly incompetent and inasmuch as this court has held in Ex Parte Garland 4 Wall 333 (379) and Schware vs. Board of Bar Examiners 353 U. S. (232) that the practive of law is not a matter of

the state's grace subject to denial without due process, it is evident that there has been raised here a substantial federal question of denial of Due Process. Both a criminal and one whose mental competence is in question are accorded representation by counsel. Where, as here, representation is denied to a person, both a defendant and possibly incompetent, in flagrant violation of state procedure, App. Pg. 20, it is manifest that due process has been denied and a substantial federal question raised which should be reviewed.

—IV—

Question 4

As set out in the paragraph next above, this court has clearly determined that a state cannot exclude a person from the practice of law in a manner that contravenes the Due Process or Equal Protection Clauses of the Fourteenth Amendment and that such process must be in accordance with "the law of the land." Referring to Rule 24, State of Washington, "Old" Rules for Discipline of Attorneys, App. Pg. 21, it is clear that the use of the mandatory word "shall" was intentional and requires that an accused be represented by counsel. This is further emphasized by the wording of Rule 7-D, "New" Washington Rules for Discipline of Attorneys, App. Pg. 20, which uses the permissive word "may." The Disciplinary Proceeding herein referred to was commenced long before the effective date of the "New" Washington Rules for Discipline of Attorneys. And for that reason Rule 24 clearly applies. Moreover, in view of the statutes providing counsel for criminals and incompetent persons it is even clearer that Due Process and Equal Protection of the laws insured by the Fourteenth Amendment to the Constitution of the United States, has been denied. Amid the procedural confusion surrounding both ad-

mission and discipline, attorneys are peculiarly vulnerable to abuses of procedure, which gives special importance to the necessity for this court granting this Writ of Certiorari so that uniform rules may be established for protection of the legal profession in this area of national significance.

—V—

Questions 5 and 6

The right of attorneys, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, to due process and adherence to "the law of the land" in disciplinary proceedings has been examined above. This right is equally pertinent in Questions 5 and 6 herein presented. For a panel chairman, having a record before him in which the only medical evidence raises serious doubts as to the competence of the accused, (Ex. B, Brief of Petitioner), to rule, based solely on his own past experience and personal observations (Page 4, Ex. B, Aff. for Writ of Prohibition, App. Pg. 22, that the accused is "of sound and sufficient mind" is such obvious and flagrant abuse of due process as not to require elaboration. Especially in view of Rule 7 K-2, "New" Washington Rules for Discipline of Attorneys, set out herein, App. Pg. 20, which requires the determination to be by the whole panel of three members and in view of the affirmance of this flagrant violation of "the law of the land" by the Supreme Court of the State of Washington, the federal question here raised becomes clear and the need for this court to review this gross error by the highest state court on a question of substance and significance becomes important.

—VI—

Question 7.

Early in the history of this country a rule was adopted by no less a jurist than Chief Justice Marshall, that "the judiciary cannot, as a legislature may, avoid a measure . . ." Cohens vs. Virginia 6 Wheat. 264 (403) 5 L. Ed. 257 (291) That justice be done and that men may have an answer to their affairs, courts must determine all questions properly presented. 14 AJ Courts, Sec. 28. Though a rule of antiquity and wisdom, it is one most worthy of recognition and reaffirmance by this court. An examination of the Petition for Writ of Prohibition herein reveals (Prayer of Aff. for Writ of Prohibition, App. Pg. 24), four requests. 1. Appointment of Counsel. 2. Presentation of Evidence as to Present Mental Capacity. 3. That the Full Panel determine Mental Capacity. 4. That the Proceedings be Conducted Lawfully. The Order herein rules only as to the first of these requests, denying the same. In their Response to Order to Show Cause the respondents make this additional request. (Response to Order to Show Cause, Page 10). That Mr. Sherman be placed on the roll of inactive members until he is mentally capable of defending.

As to none of the last four requests has the Supreme Court of the State of Washington made any decision. Inasmuch as the Order to Show Cause suspends proceedings in the Disciplinary Proceeding "pending disposition," Page 3, Order to Show Cause, it is here submitted that no further proceedings can be legally had therein pending full disposition. Whether at some future date a full disposition will be made is not answered. However, it becomes clear that again the law has been ignored raising a federal question and resulting in a deprivation of due process, thereby presenting a question of substance and importance, the reaffirm-

ance of the answer to which is of national significance.

—VII—

Question 8

Effective January 2, 1961, "New" Rules for Discipline of Attorneys were adopted by the Supreme Court of the State of Washington, 57 Wash. 2nd. xliv, several years after the acts of petitioner complained of in the Matter of Disciplinary Proceedings as to Arthur Eber Sherman, Jr. The court has, in its opinion in said proceeding, by advisory dictum, allocated the burden of proof. 58 Wash. 2nd 1 (7 and 9). By the Order of July 3, 1962, herein, the court now orders that the Disciplinary Proceedings be governed by the rules of January 2, 1961, in their entirety. (App. Pg. 18. Any law which alters legal rules of evidence as to an act done before its passage, is an Ex-Post Facto law. 16-A CJS Const. Law, Sec. 435, Landay vs. U. S. CAA Mich. 108 F 2nd 698. Since a Disciplinary Proceeding is punitive in its nature, it is clear that the Order, to the extent it may deprive petitioner of substantial rights in the disposition thereof, is in violation of the Ex-Post Facto Clause of Article 1, Sec. 10, of the Constitution of the United States. The correction of this error is further reason for the review of this matter by this court.

Conclusion

Whereas the Supreme Court of the State of Washington has erred in appointing counsel in Disciplinary Proceedings as to petitioner, Arthur Eber Sherman, Jr., and compeling said counsel to serve without compensation and whereas neither the Board of Governors of the Washington State Bar Association, nor the Supreme Court of the State of Washington has ad-

hered to the rules for Discipline of Attorneys, State of Washington, and whereas the Supreme Court of the State of Washington has failed and refused to rule on many issues presented to it, and whereas said Supreme Court has acted in violation of the Ex-Post Facto Clause of Article 1, Sec. 10, of the Constitution of the United States, it is respectfully submitted that this Petition For Writ of Certiorari to review the order of the Supreme Court of the State of Washington should be granted and said Order be corrected.

Respectfully submitted,

James E. Durce,
NEVITT BUILDING.
RAYMOND, WASHINGTON.
Arthur E. Sherman, Jr.
WERLEY BUILDING.
SOUTH BEND, WASHINGTON.

APPENDIX

Order Of The Supreme Court Of The State Of Washington Dated July 3, 1962

This cause came on for hearing before this court, sitting en banc, on June 14, 1962, upon:

A. Application of Arthur Eber Sherman, Jr., for a writ prohibiting the Board of Governors of the Washington State Bar Association and the Trial Committee or Panel of said Board, E. Frederick Velikanje, Harvey Erickson, and Leo Driscoll, from further proceeding **In the Matter of the Disciplinary Proceedings Against Arthur Eber Sherman, Jr., an Attorney at Law** (C. D. 4687), now pending before them, until said Board or Trial Committee thereof has appointed counsel to represent Arthur Eber Sherman, Jr., in said proceeding in accordance with Rules for Discipline of Attorneys;

B. Order to Show Cause issued by this court May 14, 1962;

C. Respondents' Response to Show Cause Order; and

D. Arthur Eber Sherman, Jr.'s Motion to Strike a Portion of Respondents' Response to Order to Show Cause.

Arthur Eber Sherman, Jr., appeared in person and by counsel, James E. Duree; respondents appeared by their counsel, T. M. Royce.

This court having considered the records, briefs, and argument of counsel, and being fully advised in the premises,

It Is Ordered:

First: Arthur Eber Sherman, Jr.'s (a) motion to strike a portion of respondents' response to show cause order and (b) application for writ of prohibition, as herein described, be, and the same herewith are, denied;

Second: The Board of Governors and Trial Committee thereof be, and they herewith are, directed to proceed with dispatch in **The Matter of the Disciplinary Proceedings Against Arthur Eber Sherman, Jr., an Attorney at Law** (C. D. 4687), in accordance with the Rules for Discipline of Attorneys, RCW Vol. 0, and the opinions of this court in 58 Wn. (2nd) 1 (1961); trial hearings thereon to be held in Pacific County, Washington;

Third: Since the Rules for Discipline of Attorneys, RCW Vol. 0, do not provide for the appointment of counsel under the circumstances and present posture of the aforementioned disciplinary proceedings, this court, exercising its inherent power, appoints James E. Duree, a member of the Bar of this state, to represent Arthur Eber Sherman, Jr., in said disciplinary proceedings.

Rules For Discipline Of Attorneys

State Of Washington

Rule 7 K-2, 57 Wash. 2nd lit. HEARING AS TO MENTAL CAPACITY TO DEFEND. If the respondent attorney has not been judicially declared to be of unsound mind, or incapable of conducting his own affairs, but it shall appear to the chairman of the Panel that there is reasonable cause to believe that the respondent attorney is of unsound mind to the extent that he is incapable of conducting a proper defense to the formal complaint against him, the chairman of the Panel shall fix a time and place for a hearing before the Panel on the sole issue of the respondent attorney's mental capacity to defend the formal complaint against him. It shall be the duty of the chairman of the Panel to appoint counsel to act for and on behalf of the respondent attorney in the proceedings in this subsection provided, should the respondent attorney not have counsel of his own choosing.

If it shall be determined by the Panel that said respondent attorney is mentally capable of conducting a proper defense, the proceedings shall continue in accordance with Rule VII A through J, inclusive. If, however, it shall be determined by the Panel that the respondent attorney is not mentally capable of conducting a proper defense, the Chief Justice of the Supreme Court, on application of the Association shall appoint a member of the Washington State Bar Association as guardian ad litem for the respondent attorney. The file in such proceeding shall be kept sealed. All pleadings, notices and other documents herein required to be served upon the respondent attorney shall likewise be served upon such guardian ad litem and all proceedings on the complaint made as to the respondent attorney shall be determined as hereinafter provided.

Rule VII-D, 57 Wash. 2nd, lvi. REPRESENTATION. The Association shall be represented at hearings before the Panels by State Bar Counsel. The re-

spondent attorney may be represented by counsel if he so desires.

Rule 11-J, 57 Wash. 2nd lxvii. GUARDIAN AD LITEM AND APPOINTED COUNSEL. The fees for services rendered and costs expended and incurred by a guardian ad litem or counsel appointed under Rule VII K 1 and 2 shall be paid by the Association.

Rule 24, 34-A, Wash. 2nd 190, Court Rules, COUNSEL APPEARING BEFORE TRIAL COMMITTEE. The state bar shall be represented at hearings before the trial committees by general or special counsel. The accused shall be represented by counsel, if he so desires. The complainant may be represented by his own counsel, if he so desires.

EXCERPTS FROM OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON AND FROM ADDITIONAL FINDINGS OF FACT AND RECOMMENDATIONS, DISCIPLINARY PROCEEDINGS AS TO ARTHUR EBER-SHERMAN, JR.

In Re Sherman, 58 Wash. 2nd. 1.

Page 5 ". . . . we are deeply concerned with whether the need is not for psychiatric care, rather than disciplinary action."

Page 5 "It seems to us to suggest a type of mental illness involving a persecution complex, rather a willful perjury."

Page 6 ". . . . we are concerned with whether he is mentally responsible for what he has done."

Page 6 "It is our view that this matter should be remanded to the Board of Governors of the Washington State Bar Association for further investigation along the lines suggested by the dissenting member of the Trial Committee."

The suggestions of the dissenting member, referred to by the court, were, in part, as follows:

> "That a psychiatrical examination of said Arthur Eber Sherman, Jr. be authorized and a report made to the Trial Committee as to the results of that examination touching upon his present mental responsibility, his present psychoneurotic trends, if any, and the probability of his responsibility as to psychoneurosis in 1956."

Ruling Of Panel Chairman

Ex. B, Aff. For Writ Of Prohibition, Pg. 4.

. . . . the Chairman must, therefore, base it upon past experiences both in hearing and upon personal observations of Mr. Sherman, and to the best of this Chairman's knowledge Mr. Sherman is and has been practicing law in Pacific County and I, therefore, determine as Chairman of this Panel that Mr. Sherman is of sound and sufficient mind, that he could defend himself should he so desire.

We will therefore, proceed with this hearing and the motion for appointment of an attorney at this time —wait a minute. I'd like to consult just a moment with the other members of the panel as I think the only responsibility of the Chairman is to determine the mental capacity of Mr. Sherman.

Excerpts From

Affidavit For Writ Of Prohibition

VI . . . that said Chairman, based on his own experience, personal observations determined that the plaintiff herein is of sound and sufficient mind, that he could defend himself should he so desire, said determination depriving the plaintiff herein of due process of the law and being contrary to the rules of the court, laws, statutes and Constitution of the State of Washington and the Constitution of the United States.

XI . . . . that the plaintiff herein alleges that no determination has ever been made by the trial committee or panel herein of the issue of mental capacity of the plaintiff herein to defend the formal complaint against him contrary to Rule 7 K-2 of the Rules of Discipline of Attorneys, rules of court, laws, statutes and Constitution of the State of Washington and Constitution of the United States.

XII . . . . that no further opportunity will be granted said plaintiff to present evidence as to his mental capacity to defend the formal complaint against him; that no further proceeding will be had as to said present mental capacity and that he has been denied counsel as to said determination of his mental capacity to defend the formal complaint against him all contrary to the rules of court, laws, statutes and Constitution of the State of Washington and the Constitution of the United States.

XIII . . . . denied said plaintiff an opportunity to present evidence on the issues there involved, deprived said plaintiff of due process of the law and are contrary to the rules of court, laws, statutes, and Constitution of the State of Washington and the Constitution of the United States.

XIV . . . . that the plaintiff herein has no speedy or adequate remedy in the proceeding referred to herein, by appeal or otherwise, as appears from the averments set out above. The records and proceedings in said cause, the rules of court, laws, statutes and Constitution of the State of Washington and the Constitution of the United States. . . . . .

Letter Dated August 1, 1962, To Mr. Duree From Clerk Of The Supreme Court Of The State Of Washington

Mr. James E. Duree
Nevitt Building
Raymond, Washington

Dear Mr. Duree:

Re: No. 36560

Sherman v. Board of Governors

On July 30, 1962, the Chief Justice denied by notation order a motion by Mr. Sherman for an extension of time in which to file a petition for rehearing of the order of this court entered on July 3, 1962, in the above proceedings.

You will note that in the affidavit in support of his motion, a copy of which is attached, Mr. Sherman states "that inasmuch as no provision is made in said order or otherwise for compensation for his services as such, James E. Duree, a member of the Bar of this state declines to serve as attorney for and to represent the plaintiff herein in this cause or in the matter of the Disciplinary Proceedings . . .". The Chief Justice directed me to inform you that the court assumes that you are complying with paragraph three of the order of this court entered in the above proceedings on July 3, 1962, appointing you to represent Mr. Sherman in the disciplinary proceedings. The court is aware that the order does not provide for compensation.

Very truly yours,

William M. Lowry,
Clerk.

Prayer Of
Affidavit For Writ Of Prohibition

. . . requiring said respondents to Show Cause, if any they have, why they, or any of them, should not appoint counsel to act for and on behalf of plaintiff herein in said hearing for the determination of the mental capacity of plaintiff to defend the formal complaint against him; why the plaintiff herein should not be allowed to present evidence of his present mental capacity so to defend; why at the proper time and after the proper proceedings, said Trial Committee should not determine the mental capacity of the plaintiff herein to defend the formal complaint against him and why the respondents herein should not conduct said proceedings in accordance with the rules of court, laws, statutes and Constitution of the State of Washington and he Constitution of the United States.